

Supreme Court, U.S.  
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NO. 87-1845

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

MARIANNE RUTLAND CHAISSON,  
*Petitioner*

v.

LAWRENCE J. RUTLAND,  
*Respondent*

RESPONSE TO  
PETITION FOR WRIT OF CERTIORARI

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I

**QUESTIONS PRESENTED**

1. Does this Court lack jurisdiction because Petitioner's federal claim was not properly presented to the state court?
2. Does Petitioner's failure to make a timely objection at trial constitute an adequate and independent state ground which precludes this Court from reviewing her First Amendment claim?
3. Is there a "compelling state interest" in providing for the "best interest of the child" which outweighs Petitioner's First Amendment claims even under a strict scrutiny standard?

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**RESPONSE TO  
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*To The Honorable United States Supreme Court:*

LAWRENCE J. RUTLAND, Respondent, urges this Court to dismiss Petitioner's Petition For Writ of Certiorari for want of jurisdiction or, alternatively deny same. For sound procedural reasons, the courts below never passed on the merits of Petitioner's federal claim, and this Court should likewise decline to review the merits. However, should this Court choose to reach the merits, Certiorari should be denied.

## RESPONDENT'S STATEMENT OF THE CASE

This is a child custody case. The parties were divorced in early 1983, and the managing conservatorship of the children was awarded by agreement to Petitioner.<sup>1</sup> In 1984 Respondent filed suit to replace Petitioner as managing conservator of the children. After a three day jury trial which included fairly extensive evidence concerning Petitioner's religious beliefs and the affects of those beliefs upon the children, the trial court entered judgment appointing Respondent as managing conservator of the children and appointing Petitioner as possessory conservator.

Petitioner made no objection at trial to the numerous questions directly or indirectly relating to her religious beliefs and practices. Petitioner likewise made no objections to questions directed to a child psychologist, the children's school teacher, and the children's grandmother which related either directly or tangentially to Petitioner's religious beliefs. As noted by the Texas Court of Appeals, Petitioner's sole objection at trial occurred during Respondent's testimony near the end of this three day trial. (Appendix to Petition For Writ of Certiorari at 13). There, Petitioner objected to the question of whether *Respondent* would celebrate Christmas and birthdays with the children on the grounds of "religious bias." (*Id.* at 9).

As a result of the failure to object, the Texas Court of Appeals held that any error was waived and declined to reach the merits of Petitioner's contentions regarding the vast majority of the evidence she found objectionable.

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1. Under Texas law, the person having a general custody of a child pursuant to court order is designated the "managing conservator." A person having visitation rights with the child is designated a "possessory conservator."

(*Id.* at 2, 16). In the one instance where Petitioner did raise an objection, the Court ruled that, in view of the mass of similar evidence admitted earlier without objection, the error, if any, was harmless. (*Id.* at 17). Thus, the Texas Court of Appeals affirmed. The Texas Supreme Court refused Petitioner's Application For Writ of Error finding no reversible error.

### **REASONS FOR DISMISSING OR DENYING THE WRIT**

1. Does this Court lack jurisdiction because Petitioner's federal claim was not properly presented to the state court?

This Court has jurisdiction to review the final judgment of a state court "only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497, 101 S. Ct. 1889, 68 L.Ed.2d 392 (1981). Some cases state that the issue of proper presentation to the state courts is "itself ultimately a federal question, as to which this Court is not bound by the decisions of the state courts." *Street v. New York*, 394 U.S. 576, 583, 89 S. Ct. 1354, 22 L.Ed. 2d 572 (1969). However, more recent cases hold that this Court lacks jurisdiction unless "[a]t the minimum . . . there [is] no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim *at the time and in the manner* required by the state law." *Bankers Life And Casualty Co. v. Crenshaw*, \_\_\_\_U.S. \_\_\_, 108 S. Ct. 1645, 100 L.Ed. 2d 62, (May 16, 1988), quoting *Webb v. Webb*, *supra*, 451 U.S. at 501.

There is no doubt that the federal issue which Petitioner is attempting to bring before this Court in the present case was not presented to the Texas courts at the time and in the manner required by state law. Rule 103(a) of the Texas Rules of Civil Evidence requires a contemporaneous objection or Motion to Strike in order to complain on appeal of the admission of evidence.<sup>2</sup> Rule 103, of course, is merely a codification of long standing state law. *E.g., Stonecipher v. Butts*, 686 S.W. 2d 101, 103 (Tex. 1985). Furthermore, it is, perhaps, significant that Texas law does not include any concept of "plain error." Thus, the Texas version of Rule 103 contains no counterpart to Federal Rule 103(d).<sup>3</sup> Thus, the issue raised in the Petition For Certiorari has not been properly presented to the Texas Courts, and this Court should dismiss for want of jurisdiction.

2. Does Petitioner's failure to make a timely objection at trial constitute an adequate and independent state ground which precludes this Court from reviewing her First Amendment claim?

Regardless of whether this Court has jurisdiction, the state procedural bar constitutes an "adequate and independent state ground" which precludes this Court from reviewing the merits. This Court has developed three requirements which a state procedural rule must meet in order to qualify as an adequate and independent ground. First, the state rule must provide a litigant with

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2. The first sentence of the Texas Rule is derived *verbatim* from Rule 103(a) of the Federal Rules of Evidence.

3. Texas law does include the concept of "fundamental error." However, this concept was never as broad as the federal concept of "plain error," and, as noted by the Court of Appeals, has now been virtually abolished. See *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982).

a "reasonable opportunity" to assert and vindicate his federal rights. *Parker v. Illinois*, 333 U.S. 571, 68 S. Ct. 708, 92 L.Ed. 886 (1948). Secondly, the state procedural rule must "serve a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447, 85 S. Ct. 564, 13 L.Ed. 2d 408 (1965). Finally, the state procedural rule must be "strictly or regularly followed." *Johnson v. Mississippi*, 56 U.S.L.W. 4561 (June 13, 1988).

The requirement of a contemporaneous objection meets all of these requirements. Petitioner can hardly contend that she had no reasonable opportunity to assert her federal rights. The requirement of voicing an objection and advising the trial judge of her contention was neither unreasonable nor unduly burdensome. Indeed, the federal courts (and every other jurisdiction with which counsel is familiar) impose a similar requirement. Secondly, the requirement of a contemporaneous objection serves numerous legitimate state interests. In *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2494, 53 L.Ed.2d 594 (1977) this Court recognized some of the many legitimate state interests served by the requirement of a contemporaneous objection. This requirement "enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest." 433 U.S. at 88. The requirement "enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question." *Id.* The requirement "may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation."<sup>4</sup> *Id.* The requirement of a contemporaneous

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4. This, of course, is a civil case, but the state has an equally legitimate interest in the finality of civil litigation.

objection discourages "sandbagging", i.e. taking ones chances with the jury verdict "with the intent to raise . . . constitutional claims" on appeal, if necessary. *Id.* at 89. Most importantly the requirement tends to reduce the amount of error in judicial proceedings. "Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification. *Id.* at 90. Turning to the third requirement, as this case illustrates, Texas courts uniformly and consistently apply the requirement that there must be a timely objection in order to complain on appeal concerning the admission of evidence.

Thus, the Texas procedural requirement clearly constitutes an adequate and independent state ground for the decision. In fact, in *Wainwright v. Sykes, supra*, this Court stated, in dicta, that "failure to timely object to [the admission of evidence] amounted to an independent and adequate state procedural ground which would have prevented direct review here." 433 U.S. at 87.

3. Is there a "compelling state interest" in providing for the "best interest of the child" which outweighs Petitioner's First Amendment claims even under a strict scrutiny standard?

Furthermore, even if the issue were properly presented, this Court should not grant review. The state interest in the "best interest of the child" constitutes a compelling state interest that outweighs any burden thereby imposed on Petitioner's religious freedoms. The Texas Family Code provides that the "best interest of the child shall always be the primary consideration of the court in determining questions managing conservatorship, possession, and sup-

port and access to the child." Tex. Fam. Code Ann. section 14.07(a) (Vernon 1986). In a child custody dispute a determination of the best interest of the child necessarily involves a critical examination by the trier of fact of the environment which each proposed custodian would provide to the child. The environment which would have been provided by Petitioner was one totally dominated by her particular religious faith. Thus, it is difficult to imagine how the trier of fact could make an intelligent decision regarding the best interest of these children without at least some testimony concerning the nature of that religious faith.

Furthermore, Petitioner's particular religious beliefs had a major potential impact on the emotional well-being of the children. For example, Petitioner's religion apparently forbids the celebration of birthdays. Thus, while every other child on the block received, cake, ice cream, and toys on his or her birthday, these children in Petitioner's custody would receive nothing. It does not require an advance degree in child psychology to perceive that this situation could cause the average child mental anguish and perhaps, severe emotional damage. This is but one example of many. The State of Texas has a compelling interest in permitting the trier of fact to weigh factors such as these in determining the best interest of the children.

**PRAYER FOR RELIEF**

Respondent urges this Court to dismiss Petitioner's Petition for want of jurisdiction or, alternatively, to deny the petition.

Respectfully submitted,

**HAYNES & FULLENWEIDER, P.L.C.**

By:

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Response to Petition For Writ of Certiorari was duly served on Donald T. Ridley, 25 Columbia Heights, Brooklyn, New York 11201, and Michael Sloan, HARDIN AND SLOAN, P. O. Box 600, McKinney, Texas 75069 by United States mail, certified, return receipt requested on this \_\_\_\_\_ day of July, 1988.

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